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# Statutory Definitions of Public Utilities and Carriers

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## STATUTORY DEFINITIONS OF PUBLIC UTILITIES AND CARRIERS

Physical scientists have been able to classify every plant and animal discovered to date. Furthermore there is practical unanimity among them as to the classification. From the dinosaur to the smallest bacteria discernible by the microscope, scientists have been able to discover earmarks which distinguished one specie from another. In the field of legal relations, or ideas, our progress has fallen far short of that mark. In the first place our courts and legal scholars have been unable to discover definite earmarks, and, secondly, it is seldom that any two agree for any appreciable period of time on what at first appear to be earmarks. An apt illustration is the distinction between a partnership and a corporation. A partnership can acquire more and more of the attributes of a corporation, and a corporation can gradually be stripped of its franchises; but at what point do they cross the line? It becomes a "matter of degree." No wonder our students are puzzled. But it is very proper that they should be puzzled. Ideas can not be made stationary. It would be fatal to our progress if our ideas became as fixed and hidebound as those of the ancient Medes and Persians. Is my task, therefore, impossible?

Closely allied with the question of what is a public utility is the question of what "businesses are affected with a public interest" or can be so *inoculated* by the legislatures. My exploration into that field will be incidental. No guideposts, much less earmarks, were left after Professor Robinson's attempted description of a public utility as a Martian.<sup>1</sup> I believe that he made the correct approach to that subject because he clearly demonstrated that so far as the courts were concerned, especially the United States Supreme Court, that

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<sup>1</sup> Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277.

a public utility was *de gustibus non est disputandum* to the particular judge or majority writing the opinion. In an article, packed with citations of legal authority, he showed that the concept of a public utility, or the phrase "a business affected with a public interest," could not be predicated upon "felt needs," "economic dependence," "bigness," etc. But if the legislature's declaration that an enterprise was a public one got by the hurdle of state and federal courts two more problems were left for solution: (1) Had this particular business been "devoted to the public"; and (2) "What is devoted or dedicated or granted to the public interest so that it 'must submit to be controlled by the public for the common good.'"<sup>2</sup>

In 1931 Professor Hardman, in an able article, reviewed the struggle between the conceptualists and realists.<sup>3</sup> With numerous citations he shows that the concepts laid down by Mr. Wyman and Mr. Burdick will not square with the precedents. Mr. Hardman is of the opinion that, for the purpose of prophesy, the best we can do is to use the precedents as examples of what is public and what is private. He states:

"So far then it would seem that if in this realist world the lawyers, like most others, are willing to look at the 'facts,' it must be conceded that there is no universal rule, no 'solving' concept, no purely legalistic approach that will determine in all cases what fact situations constitute a public utility. . . ."<sup>4</sup>

At the time these two articles were written, the late Chief Justice Taft's three-point classification, laid down in *Wolff Packing Co. v. Court of Industrial Relations*,<sup>5</sup> was being ex-

<sup>2</sup> Robinson, *op. cit. supra* note 1, at 303.

<sup>3</sup> Hardman, *Public Utilities: 1. The Quest For a Concept* (1931) 37 W. VA. L. Q. 250.

<sup>4</sup> Hardman, *op. cit. supra* note 3, at 260.

<sup>5</sup> 262 U. S. 522, 67 L. Ed. 1103, 27 A. L. R. 1280, P. U. R. 1923D, 746 (1923). In this case Chief Justice Taft said by the way of dictum:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

pounded and applied by Mr. Justice Sutherland. And under that exposition, it was doubtful if the legislature could regulate a business as a public utility unless it was already one as a matter of common law. That this view was entertained is well illustrated by the cases of *In re Louis Wohl*<sup>6</sup> and *Alabama Public Service Corporation v. Southern Natural Gas Co.*<sup>7</sup> In the former case the court said:

"To the claimants' contention that in nearly all of the cases cited the courts were called upon to determine the validity of a price fixing statute, and that since here there exists no regulatory act of the Legislature, they are not controlling, the answer is made, and apparently with some logic, that the validity of price fixing statutes depends upon whether or not the business sought to be regulated is at common law a business clothed with a public interest, and that it is the nature of the business and its importance to the public that determines its public character, and not the fiat of the Legislature, and that in the instant case, while there is no state statute regulating the price which shall be charged by newspapers for advertising, yet, in the absence of such legislation, the newspaper, if clothed with a public interest, is bound by the common law to serve without discrimination. *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280."

The court then quotes from Mr. Justice Sutherland's opinion in *Williams v. Standard Oil Company of Louisiana*<sup>8</sup> as follows:

"As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion

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(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. [Citing cases.]

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the languages of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly. [Citing cases.]"

<sup>6</sup> 50 Fed. (2d) 254 (256) (D. C. E. D. Mich. 1931).

<sup>7</sup> 41 Ala. Pub. Ser. Rep. 96 (1930).

<sup>8</sup> 278 U. S. 235, 73 L. Ed. 287, 60 A. L. R. 596, P. U. R. 1929A, 450 (1929).

that it has been *devoted* to a public use and its use thereby in effect *granted* to the public [citing *Tyson v. Banton*<sup>9</sup>]. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance." <sup>10</sup>

It is apparent that the court is inclined to agree with the claimants that the test of whether a business is affected with a public interest or not depends upon facts to be considered by a court and not upon legislative declarations; but newspaper advertising is not such a business.

In the case of *Alabama Public Service Corporation v. Southern Natural Gas Co.*<sup>11</sup> the Commission had this to say:

"Since neither the State nor its Legislature can, by its statute or fiat, make one a utility who has not put himself in that position by his own acts. . . (Sec. 9792, Code 1923) must be construed as being chiefly a declaration, in part, of the common law or as a legislative construction, in part, of the common law as applicable to the right of the State to inquire into the corporate fictions or corporate relationships, to the end that the State may make reasonable application of its regulations to those who are actually within the statute and in order that the State may not be defeated because of mere forms and fictions."

Under that doctrine it is hard to see just what room there was left for legislation, other than (1) prescribing the method of regulation, and (2) judicial inertia. But be that as it may, it is sufficient to say that since these two articles were written much water has run over the dam. The struggle between what Mr. Hardman termed the conceptualists and the realists still goes on with the realists on top at the present writing. I refer to the case of *Nebbia v. New York*.<sup>12</sup> In that case the New York Legislature created a board and empowered it to fix the retail prices of milk. The Act made a violation of the board's rulings a criminal of-

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<sup>9</sup> 273 U. S. 418, 71 L. Ed. 718, 58 A. L. R. 1236 (1927).

<sup>10</sup> In re Louis Wohl, *op. cit. supra* note 6, at 256.

<sup>11</sup> *Op. cit. supra* note 7.

<sup>12</sup> 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469, 2 P. U. R. (N. S.) 337 (1934). *Contra* Reynolds v. Milk Commission, 177 S. E. 44 (1934 Va.), commented on in 21 VA. L. REV. 336. See, also, Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401; *Nebbia v. People: A Milestone* (1934) 82 U. OF PA. L. REV. 619.

fence. The Board fixed the retail price of milk at 9¢ a quart for grocerymen, and 10¢ a quart for distributors. Nebbia, a groceryman, sold two quarts of milk for 18¢ and threw in a 5¢ loaf of bread to boot. He was prosecuted criminally and fined \$5 and costs. He appealed, unsuccessfully, through the State's courts, and finally lost in the United States Supreme Court. The importance of this decision for our purpose is the majority opinion of Mr. Justice Roberts, which practically wiped out the following distinctions: (1) That the "due process" clause prohibited a state from regulating a business to the extent at least of fixing prices, unless it was a business "affected with a public interest"; and (2) The distinction between price-fixing and any police regulation. In short the opinion repudiates the doctrine of a "business affected with a public interest." On the latter subject, the Court said:

"The phrase 'affected with a public interest' can in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several decisions of this Court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

So far as the "due process" clause is concerned, the Court practically gave the states a clear right-of-way, saying:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the require-

ments of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this Court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U. S. 197, 337, 338, 24 S. Ct. 436, 457, 48 L. Ed. 679 [700, 701]. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and though the courts may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

That the majority intended to destroy the distinction secondly above mentioned seems clear from the following language:

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself."

What are the limitations of this decision? First it may be contended that this is not a public utility case at all. The Court says:

"We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility."

This contention is probably well taken, if we are using "public utility" in any strict sense. Under the regulation in question, *Nebbia* would not have had to serve all who come; nor would he have had to obtain the consent of the Milk Board to have quit business; he could not have exercised the

right of eminent domain in order to enlarge his store, even though there had been or is a state statute granting such right to all public utilities; nor would a competitor have had to obtain consent of the Milk Board to set up business. His business was in no sense dependent upon a public grant or franchise; nor could he have prevented his business from being sold on execution in satisfaction of a judgment. We usually think of such legal duties and privileges belonging to and attaching to public utilities under modern day statutes. Could the State of New York have carried regulation of the milk business to this extent? The Court very properly did not answer that question, the answer not being necessary to the decision; but, from the language above quoted, it would seem that the question could fairly be answered in the affirmative. Therefore, I contend that the decision is a constitutional base for the statutes which I shall take up presently.

Secondly, it may be said that this was a five-to-four decision, and may be distinguished in subsequent cases because of the emergency that existed in New York at the time of the passage of the law. That this possibility exists no one will deny.<sup>13</sup> Furthermore, if the liberal doctrine set forth in this case is rigidly adhered to, grave questions could be brought before the United States Supreme Court. For ex-

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<sup>13</sup> The reader's attention is respectively called to Chief Justice White's statement in *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024 (1917), and Chief Justice Taft's comment on it in *Wolff Packing Co. v. Court of Industrial Relations*, *op. cit. supra* note 5:

White (In *Wilson v. New*.): "Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power. Ex parte Mulligan, 4 Wall. 2, 18 L. Ed. 281. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."

Taft (In *Wolff Packing Co. v. Court of Industrial Relations*.): "It is urged that, under this act the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in *Wilson v. New* . . . it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted."



ample, under the doctrine of this case, what is to prevent a state from declaring every business to be a public utility subject to the jurisdiction of the Public Service Commission? And then what would prevent the Public Service Commission from abrogating any and every private contract, without regard to whether it was made before or after the new law had been passed? <sup>14</sup>

But notwithstanding these limitations and possibilities, I believe that we can fairly say that the various state statutes defining public utilities and carriers are constitutionally sound in so far as the Fourteenth Amendment is concerned. Prior to the *Nebbia* case the United States Supreme Court had held, or said by the way of dictum, that the following businesses were, at least under certain circumstances, affected with a public interest: railroads, <sup>15</sup> street railways, <sup>16</sup> common carriers, <sup>17</sup> inns, <sup>18</sup> warehouses and elevators, <sup>19</sup> cotton gins, <sup>20</sup> wharves and wharfingers, <sup>21</sup> water companies, <sup>22</sup> gas companies, <sup>23</sup> electric light and power, <sup>24</sup> telephones and tele-

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<sup>14</sup> See *Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co.*, 267 U. S. 231, 69 L. Ed. 588 (1925).

<sup>15</sup> *Chicago, Burlington & Quincy R. R. Co. v. Cutts*, 94 U. S. 155, 24 L. Ed. 94 (1877); *United States v. Joint-Traffic Association*, 171 U. S. 505, 43 L. Ed. 259 (1898); *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051 (1892); *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819 (1898).

<sup>16</sup> *Honolulu Rapid Transit & L. Co. v. Hawaii*, 211 U. S. 282, 53 L. Ed. 186 (1908).

<sup>17</sup> *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1877); *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U. S. 207, 72 L. Ed. 241 (1927).

<sup>18</sup> *Munn v. People of Illinois*, *op. cit. supra* note 17; *Wolff Packing Co. v. Court of Industrial Relations*, *op. cit. supra* note 5.

<sup>19</sup> *Munn v. People of Illinois*, *op. cit. supra* note 17; *Brass v. State of North Dakota*, 153 U. S. 391, 38 L. Ed. 757 (1894); *Budd v. State of New York*, 143 U. S. 517, 36 L. Ed. 247 (1892).

<sup>20</sup> *Frost v. Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483 (1929).

<sup>21</sup> *Munn v. People of Illinois*, *op. cit. supra* note 17.

<sup>22</sup> *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154 (1899); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1101, L. R. A. 1915C, 1189 (1914).

<sup>23</sup> *German Alliance Ins. Co. v. Lewis*, *op. cit. supra* note 22.

<sup>24</sup> *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420 (1919).

graphs,<sup>25</sup> pipe lines,<sup>26</sup> ferries,<sup>27</sup> towboats,<sup>28</sup> taxicabs,<sup>29</sup> taxi-stands,<sup>30</sup> stockyards,<sup>31</sup> insurance,<sup>32</sup> insurance brokers,<sup>33</sup> renting of dwellings,<sup>34</sup> and banks (to the extent of compelling then to contribute to a depositors' guaranty fund);<sup>35</sup> and that the following were not subject to such regulation: private carriers,<sup>36</sup> ticket scalping,<sup>37</sup> gasoline,<sup>38</sup> meat packing,<sup>39</sup> private wharves,<sup>40</sup> mining,<sup>41</sup> employment agencies,<sup>42</sup> and ice.<sup>43</sup> Of course the price for the use of money has been fixed by statute from time immemorial.

We have only to watch out for the interstate commerce clause. Since the Federal Government is covering that field

<sup>25</sup> German Alliance Inc. Co. v. Lewis, *op. cit. supra* note 22.

<sup>26</sup> Pennsylvania v. West Virginia, 262 U. S. 553, 67 L. Ed. 1117, 32 A. L. R. 300 (1923); Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 64 L. Ed. 239 (1920); United States v. Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1459 (1914).

<sup>27</sup> Munn v. People of Illinois, *op. cit. supra* note 17.

<sup>28</sup> Washington ex rel. Stimson Lumber Co. v. Kuykendall, *op. cit. supra* note 17.

<sup>29</sup> Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. Ed. 984, Ann. Cas. 1916D, 765, P. U. R. 1916D, 972 (1916).

<sup>30</sup> Terminal Taxicab Co. v. Kutz, *op. cit. supra* note 29.

<sup>31</sup> Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 23 A. L. R. 229 (1922).

<sup>32</sup> German Alliance Ins. Co. v. Lewis, *op. cit. supra* note 22.

<sup>33</sup> O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 L. Ed. 324 (1931).

<sup>34</sup> Block v. Hirsh, 256 U. S. 135, 65 L. Ed. 865, 16 A. L. R. 165 (1921); Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. Ed. 877 (1921). But the power terminates when the emergency is over. Chastleton Corporation v. Sinclair, 264 U. S. 543, 68 L. Ed. 841 (1924).

<sup>35</sup> Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062 (1911).

<sup>36</sup> Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. Ed. 445, 36 A. L. R. 1105 (1925); Frost v. Railroad Commission, 271 U. S. 583, 70 L. Ed. 1101 (1926); Washington ex rel. Stimson Lumber Co. v. Kuykendall, *op. cit. supra* note 17.

<sup>37</sup> Tyson & Bro. v. Banton, 273 U. S. 418, 71 L. Ed. 718, 58 A. L. R. 1236 (1927).

<sup>38</sup> Williams v. Standard Oil Co., 278 U. S. 235, 73 L. Ed. 287, P. U. R. 1929A, 450 (1929).

<sup>39</sup> Wolff Packing Co. v. Court of Industrial Relations, *op. cit. supra* note 5.

<sup>40</sup> Munn v. Illinois, *op. cit. supra* note 17; Louisville & Nashville R. R. Co. v. West Coast N. S. Co., 198 U. S. 483, 49 L. Ed. 1135 (1905).

<sup>41</sup> Wolff Packing Co. v. Court of Industrial Relations, *op. cit. supra* note 5.

<sup>42</sup> Ribnik v. McBride, 277 U. S. 350, 72 L. Ed. 913 (1928).

<sup>43</sup> New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. Ed. 747, P. U. R. 1932B, 433 (1932).

more fully as time goes on, the utilities will be less inclined to use it as a barrier. That clause should become less troublesome in the future. If it be conceded, therefore, that the statutes are reasonably safe constitutionally then it would seem that a study and comparison of the statutes is in order. Our question then is what does the statute mean as interpreted by the courts. We can now deal with the kind of law that clients are willing to pay for, the kind of law that trial judges can understand, and the kind that can be labelled. We leave the realm of speculation and metaphysics and deal with more tangible and concrete terms.

The statutes do not contain an all-inclusive definition. They do not purport to repeal the common law. The statutes define public utilities for the "purpose of this Act," which is for the purpose of stating the jurisdiction of the public service commissions. Still the question can and often arises whether a business is a public utility as a matter of common law. For example, an insurance policy provides double indemnity if the insured is killed while riding in a *public conveyance*;<sup>44</sup> goods are stolen while being transported by a cartman;<sup>45</sup> goods are destroyed while in the custody of a forwarder;<sup>46</sup> or a farmer attempts to compel a ginner to gin his cotton.<sup>47</sup> But the category at common law has been pretty well worked out. This phrase of the law presents, at this time, no great difficulty. The statutes and their interpretations are more or less virgin soil, and in this paper I shall attempt to explore them. The lack of development in this field is due no doubt to the uncertainty, previously described, of what businesses could constitutionally be classified as public utilities, what activities were subject to regulation, and to what extent regulation could be carried.

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<sup>44</sup> *Anderson v. Fidelity & Casualty Co. of New York*, 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544 (1920).

<sup>45</sup> *W. N. Stevenson & Co., Inc. v. Hartman*, 231 N. Y. 378, 132 N. E. 121, 18 A. L. R. 1314 (1921).

<sup>46</sup> *Kettenhofen v. Globe Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902, Ann. Cas. 1914B, 776 (1912).

<sup>47</sup> *Tallassie Oil & Fertilizer Co. v. Holloway*, 200 Ala. 492, 76 So. 434, L. R. A. 1918A, 280 (1917). *Contra Ladd v. The S. C. P. & M. Co.*, 53 Tex. 172 (1880).

Every state and the District of Columbia, except Delaware, have a public service commission. They are designated as "Public Service Commission," "Board of Public Utility Commissioners," "Railroad Commission," "Corporation Commission," "Commerce Commission," etc. Their jurisdictions usually extend over some one or several of the following businesses: electricity, steam, gas, street, steam, inter-urban, and subway railways, motor trucks and busses, water, sewers, irrigation, telephones, telegraphs, pipelines, cotton gins, stock yards, mining, wharves, warehousess and elevators, ferries, toll bridges and roads, radio broadcasting, transfer of baggage, express, and other common carriers operated or services rendered in connection with railroads. By study and comparison we shall notice that a number of definitions have strong similarities, and upon study of the court interpretations we shall see certain common law concepts have been read into them. Also, we usually find the statutory definitions of motor trucks and busses in a separate act from other public utilities.

#### PUBLIC UTILITIES OTHER THAN MOTOR CARRIERS

Federal and state regulation began with steam railroads. There was soon added those utilities which operate in connection with the steam railroads, that is, express, sleeping cars, telegraphs, etc. The first group of statutes to be discussed were modeled after the Wisconsin statute. At first Wisconsin extended regulation to railroads and utilities operated in conjunction with railroads. The railroad definition consisted of little more than a catalogue of these utilities. Later when regulation was extended to modern utilities, that is, gas, electricity, water, etc., a new definition was enacted for these utilities. No notice was taken of the old railroad act, nor any attempt to make it a part of the new definition. The definition in the Uniform Act was modeled after this pattern.

The second group to be discussed have followed the New York definition. This definition attempts to answer both *who* and *what* are subject to regulation, by long tedious definitions of such terms as "railroads," "railroad corporation," etc. As jurisdiction of the commission was extended to other utilities they were dissected and the parts defined in similar manner, so that all definitions became component parts of the whole.

The third group have various definitions of railroads and connected utilities. These states are grouped together because they have not yet extended the jurisdiction of their commissions to include such modern day utilities as gas and electricity.

The last group to be discussed have not made any serious attempt to define the utilities subject to regulation at all but have listed them and left the definition or description of them to the courts.

As the Uniform Public Utilities Act is not a proposal of new legislation but an attempt to unify existing law where uniformity is practicable and desirable, it is apropos to study the statutes of the first group by comparison with the definitions set forth in the Uniform Act. Its definitions and explanatory notes are as follows:

"SECTION 1. (*Definitions.*) (a) The term 'corporation,' when used in this Act, includes [a municipality], a private corporation, an association, a joint stock association or a business trust.

*Note:* The utility laws of the following states give the commission control over municipally owned utilities: California, Colorado, Indiana, Maine, Maryland, Montana, Nevada, New York, Utah, Vermont (except waterworks), West Virginia, Wisconsin, and Wyoming.<sup>48</sup> The following states exempt municipally owned utilities from commission control: Alabama, Arkansas, Connecticut, Idaho, Illinois, Louisiana, Michigan, New Hampshire, New Jersey, North Carolina, Tennessee, Virginia and Washington.<sup>49</sup>

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<sup>48</sup> Kentucky, Minnesota (telephones), South Carolina, and Texas should be added.

<sup>49</sup> Arizona, Indiana, Kansas, Oklahoma, Oregon, Rhode Island, and Utah should be added.

"(b) The term 'person,' when used in this Act, includes a natural person, a partnership or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

"(c) The term 'municipality,' when used in this Act, includes a city [a city and county], a county, a village, a town [a lighting district], and any other public corporation existing, created or organized as a governmental unit under the constitution or laws of the State.

"(d) The term 'public utility,' when used in this Act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this State equipment or facilities for:

"(1) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam or any other agency for the production of light, heat or power to or for the public for compensation;

"(2) Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation;

"(3) Transporting persons or property by street, suburban or interurban railways for the public for compensation;

"(4) Transporting persons or property by motor vehicles for the public for compensation [but not including taxicab or truck service in cities or towns].

*"Note:* Subsections 3 and 4 have demanded considerable study. They are framed to exclude both interstate and intrastate railroads. The railroad is of such a nature as to demand a good deal of special statutory treatment and the special provisions of the several states with reference to such matters as side track connections, tariffs, passes, long and short hauls, safety devices, grade crossings, etc., are both voluminous and diverse. Moreover some of the provisions are superseded by federal action and others depend upon cooperative action with the Interstate Commerce Commission. On the whole it has seemed advisable not to attempt to provide in the Uniform Act for this complicated portion of the field. Therefore railroads have not been included.

"Section 57 (b) of the Uniform Act provides, however, that all powers and duties of the present Railroad Commissions shall be continued in the utilities commissions created by the Uniform Act. The repealing section of the Uniform Act, Section 72, is so framed as to preserve all the special legislation now on the statute books relating to railroads.

"In this way the necessity of attempting to make the complicated railroad laws uniform is avoided, yet the present laws on the subject in each state are preserved, and the enforcement of them is transferred to the Public Utilities Commission herein created.

"(5) Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation;

"(6) Conveying or transmitting messages or communications by telephone or telegraph, where such service is offered to the public for compensation.

"(7) The term 'public utility' shall for rate making purposes only include any person producing, generating, or furnishing any of the foregoing services to another person for distribution to or for the public for compensation. The term 'public utility' shall not include any person not otherwise a public utility, who furnishes the services or commodity only to himself, his employees or tenants when such services or commodity is not resold to or used by others. The business of any public utility other than of the character defined in subdivision 1 to 7, inclusive, of subdivision (d) of this Section is not subject to the provisions of this Act.

"*Note:* The following additional utilities are placed under commission control in some of the states: railroads, wharfingers, warehousemen, stock-yards, refrigeration service, sewerage service, passenger terminals and union depots, canal companies, storage elevators, packing and cold storage companies for the marketing, storage or handling of food or other agricultural products, and some acts contain the blanket provision 'all other public utilities.'"

Although the Uniform Act was drafted in 1928 and approved by the American Bar Association in that year, it has never been adopted by a single state. In 1933, however, North Carolina<sup>50</sup> enacted sections 1 to 8 and 10 to 17, inclusive. It seems to me that the definition in the Uniform Act is subject to three serious criticisms. In Section 1, paragraph (d), the Act reads:

"The term 'public utility' . . . includes persons . . . owning or operating. . . ."

Why was the term "controlling," which we shall see is so often used, left out? It is reasonable to believe that this term would extend the jurisdiction of the commission to holding companies. At least one scholar has indicated such a belief.<sup>51</sup> Although the Fourteenth Amendment might have been, at one time, a barrier to the extension of such jurisdiction, certainly in view of the case of *Nebbia v. New*

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<sup>50</sup> N. C. Acts 1933, c. 307, §§ 1 to 8, 9 to 16, inc. By Chapter 134 of the Acts of 1933, the Corporation Commission was given general jurisdiction over concerns operating any of the following businesses: railroads, street-railways, steamboats, canals, express, sleeping-cars, telephones, telegraphs, electric light, power, water, gas, water power, hydro-electric, and sewerage.

<sup>51</sup> Professor Frank William Hanft, in an article entitled "Control of Public Utilities in Minnesota," 16 MINN. L. REV. 457, at page 527, says: "The act begins with the definition of terms. . . . 'street railways' means 'any association or corporation leasing, owning, managing, operating or otherwise controlling any street railway line. . . .' The definition of 'street railway' is important because it seems fairly to include holding companies. . . ."

*York* that would no longer be true. Under the Uniform Act the commissions would have no jurisdiction *per se* over holding companies because, under the familiar doctrine that a corporation is a separate legal entity from its shareholders, the holding company neither owns nor operates the operating company. That means a serious handicap to the commissions, as they would not have access to the records, accounts, etc., of the holding companies. That this handicap existed is evidenced by the enactment in various states of statutes conferring on the commissions the power to regulate and control the transactions between operating companies and holding companies. The second criticism relates to Section 1, paragraph (d), subdivision (7), of the Act, in which the National Conference undertook to define the term "public utility" for rate making purposes. It reads:

"... any person producing . . . any of the foregoing services *to another person* for distribution to or for the public for compensation." (Italics are mine.)

Take this example: *A* produces and furnishes electricity to *B*. *B* distributes it to the public for compensation. *A* is subject to rate regulation and *B* is not. Another example: *X* generates and distributes electricity to the public for compensation. *X* is not subject to rate regulation, because he is not furnishing electricity "to another person for distribution to the public for compensation." *X* is distributing his own electricity. Furthermore do the draftsmen of the Uniform Act intend for rate regulation by the commissions to cease in case a receiver is appointed for *A*? The Act says:

"The term 'public utility' shall for rate making purposes only include any *person*. . . ." (Italics are mine.)

And the definition of "person" does not include "lessees, trustees, or receivers appointed by any court whatsoever." The third criticism is the exemption from control of the commissions of public utility services furnished by an employer to his employees or tenants. This provision relegates us back to the feudal days. The common law made no such



exception, certainly at least since serfdom. Why should it be made now? Of course, such service would still be subject to the common-law rule that the rates must be reasonable; but when it is recalled that at common law contract rates were binding regardless of their reasonableness the common law would afford little, if any, protection to the employees, and tenants.

Arkansas passed a public utility act in 1935.<sup>52</sup> In framing the definitions of public utilities, the draftsmen evidently used the Uniform Act as a pattern. But the Arkansas Legislature avoided my first criticism by a section dealing with affiliated interests. On the other hand, Arkansas accentuated the second criticism by addition of the part in italics. This part of the Arkansas Act reads:

"The term 'public utility,' when used in this Act for rate-making purposes only, shall include persons . . . producing . . . or furnishing any of the foregoing services to any other person or corporation for *resale* or distribution to, or for, the public for compensation."

However, if the Department of Public Utilities did have control over the rates of any concern, it would not lose it in case the concern went into the hands of a receiver because in the definition of the word "person," which follows the term "natural persons," the following phrase was added: "A trustee, a lessee, receiver, holder of beneficial or equitable interest." The Arkansas Act is subject to the third criticism which I have made.

The Kentucky definition of 1934<sup>53</sup> was evidently modeled after the definition in the Uniform Act; but it avoids all of

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<sup>52</sup> Acts of 1935, No. 324. The Arkansas definition covers gas, electricity, steam "or any other agency for the production of light, heat, or power," and water, which are subject to rate regulation, and the following, which are not: telephone, telegraph, street railways, suburban and interurban railways, motor vehicles used in connection with or in lieu of street railways.

<sup>53</sup> Ky. Laws 1934, c. 145, § 1. The definition in this Statute covers: electricity, natural gas, artificial gas, pipe lines, water, telephones, telegraphs, street railways, suburban and interurban railways. In Carroll's Kentucky Statutes, 1933 Supp., § 201g-1, "common carrier" is defined as follows: "Whenever used in this Act, shall mean and embrace any person, corporation or company engaged in the transportation of goods or passengers for hire or compensation, within this State, by

the objections which I have raised. Her definitions of "corporation" and "person" are *haec verba* of the Uniform Act, and include municipalities. The definition of a municipality was omitted. In order to catch holding companies the Kentucky Act uses the word "control," which, as we have seen, was omitted from the definition in the Uniform Act. As to my second criticism, the Kentucky Legislature did a very sensible thing in not attempting to redefine public utilities for rate-making purposes. The one definition defines public utilities for all purposes included in the Act.

Oklahoma redefined the utilities subject to the jurisdiction of the Corporation Commission in 1929.<sup>54</sup> It does not contain the words "person" and "corporation"; but as the definition includes "every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns," it is just as comprehensive as the Uniform Act on that score. The Oklahoma Act, like the Uniform Act, does not contain the term "control." But, like the Ken-

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rail or boat, however propelled, including sleeping car companies and chair car companies, but shall not embrace street railway companies, or the operation thereof, within the city limits of a municipality." This Section also states that "carrier" means "common carrier," and that trucks and busses operating on the highway are not common carriers within the meaning of this Act.

<sup>54</sup> Okla. Laws 1929 (Spec. Sess.), p. 497. The definition in this Statute covers: gas, electricity, water, and pipe lines conveying gas. Section 18 of the Oklahoma Constitution gives the Corporation Commission jurisdiction over all transportation and transmission companies. Section 34 of the Constitution defines a transportation company as including "any company, corporation, trustee, receiver, or any other person owning, leasing, or operating for hire, a railroad, street railway, canal, steam-boat line, and also any freight car company, car association, express company, sleeping car company, car corporation, or company, trustee or person in any way engaged in any such business as a common carrier over a route acquired in whole or part under the right of eminent domain, or under any grant from the government of the United States." A transmission company is defined as including telegraph and telephone companies. This Section also defines "public service corporation" as including "all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any right of way, street, alley, public highway, whether along, over, or under the same, in a manner not permitted to the general public." "Person" is defined as including individuals, partnerships, and corporation in both the singular and plural. Cotton gins are placed under the control of the Corporation Commission by the Laws of 1929 (Spec. Sess.), p. 301.

tucky Act, it does not redefine for the purpose of rate making, and, yet, it is broad enough to include wholesalers of utility services.<sup>55</sup>

In the 1907-08 Session of the Legislature Oklahoma passed a statute which *inoculated* "virtual monopolies" with publicness, not only for the purpose of conferring jurisdiction on the Corporation Commission but for the common law as well. That Statute reads:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article (11017), said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."<sup>56</sup>

Under this Statute the Corporation Commission has extended its jurisdiction over the distributors of ice when the particular distributor has been found to have a "virtual monopoly" in his community.<sup>57</sup> In *Consumers' Light & Power Co. v. Phipps*<sup>58</sup> the Oklahoma Supreme Court held that when a distributor of ice has a virtual monopoly as a matter of fact, he, at that time, becomes a public utility and subject to the common law rule against discrimination; but the jurisdiction of the Corporation Commission was not invoked in the case. In 1925 the Oklahoma Legislature

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<sup>55</sup> *Southern Oklahoma Power Co. v. Corporation Commission*, 96 Okla. 53, 220 Pac. 370 (1923). See, also, a Note in 34 YALE L. J. 209, entitled "Wholesaler as Public Service Corporation."

<sup>56</sup> Okla. Laws 1907-08, c. 83, § 13.

<sup>57</sup> *Oklahoma Light & Power Co. v. Corporation Commission*, 96 Okla. 19, 220 Pac. 54 (1923).

<sup>58</sup> 120 Okla. 223, 251 Pac. 63 (1926).

declared that the manufacture, sale and distribution of ice to the public was "a public business," and prohibited any person from engaging in such business until he had secured a certificate of convenience and necessity from the Corporation Commission.<sup>59</sup> The constitutionality of this Statute was tested in the case of *New York State Ice Co. v. Liebmann*.<sup>60</sup> In that case the complainant, who had a certificate of convenience and necessity, sought to enjoin the defendant, who had no certificate and had never attempted to secure one, from setting up and operating a competitive ice-plant. After full hearing in the Federal District Court, the bill was dismissed for want of equity. This decision was affirmed by both the Circuit Court of Appeals and the United States Supreme Court. The ground of the decision in the latter Court was that the ice business was a private business and the "due process" clause of the Fourteenth Amendment prohibited the restriction sought to be imposed. Since the defendant had never made any attempt to secure a certificate in this case, the decision is tantamount to the proposition that under no consideration could the ice business be regulated as a public utility in Oklahoma. Mr. Justice Brandeis wrote a vigorous dissenting opinion, in which Mr. Justice Stone joined. Now in view of the fact that the philosophy of this dissenting opinion is the philosophy of the majority opinion in *Nebbia v. New York*, it is fair to assume that Oklahoma may resume again her regulation of the ice business under her "virtual monopoly" statute.

Having digressed after Oklahoma's "virtual monopoly" statute, I now come back to my comparison of the Uniform Act with other state statutes. The definition in the Uniform Act was evidently patterned after the Alabama statutory definition.<sup>61</sup> But the Alabama Statute contains the word

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<sup>59</sup> Okla. Laws 1925, c. 147. This Act was repealed by Art. 11, c. 20, Okla. Laws 1935.

<sup>60</sup> 285 U. S. 262, 76 L. Ed. 747, P. U. R. 1932B, 433 (1932).

<sup>61</sup> Ala. Laws 1920, p. 38, § 2. Section 9709 of the Alabama Code of 1923 defines transportation companies in a similar manner as public utility is defined in

"control" and does not redefine for the purpose of rate making. It does, however, make the same exemption as the Uniform Act in regard to tenants and employees.

We now come to the Wisconsin Act which was probably the mother of all the statutes in this group, including those above compared with the Uniform Act. It reads:

"As used in chapters 196 and 197, unless the context requires otherwise, 'public utility' means and embraces every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every town, village or city that may own, operate, manage or control any toll bridge or any plant or equipment or any part of any plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water, or power either directly or indirectly to the public."<sup>62</sup>

This type of statute has been followed in Indiana,<sup>63</sup> Kansas,<sup>64</sup> Montana,<sup>65</sup> Oregon,<sup>66</sup> Rhode Island,<sup>67</sup> and Virginia.<sup>68</sup>

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the Alabama Laws of 1920, and includes: railroads, express companies, car companies, sleeping car companies, steamboats, depot and terminal station companies, telegraphs, and telephones.

<sup>62</sup> WIS. STAT. (1929) c. 196.01. In chapter 195.02 a "railroad" is defined as including a railroad and the various facilities necessary to operate a railroad, express companies, telegraph companies and district telegraph messenger companies, and common carriers by water which operate between fixed termini.

<sup>63</sup> IND. ACTS 1913, p. 167. The definition in this Act includes: street railways, interurbans, telegraphs, telephones, heat, light, water, power, elevators and warehouses. Also, this Act defines "street cars" as including both track and trackless trolleys operated in any city or its environs. In the Ind. Acts of 1905, c. 53, p. 83, as amended, "railroad" is defined as including railroads, electric, interurban, and suburban railways, express and sleeping car companies.

<sup>64</sup> KAN. STAT. (1923) c. 66, § 104. The definition of "public utility" in this Statute includes: telephones, telegraphs, oil and gas pipe lines, trolleys, street, electrical or motor railways, dining-car companies, heat, light, water, and power. This Statute exempts mutual telephone associations, public owned utilities and utilities operating wholly or principally within one city. Section 105 reads: "The term 'common carriers,' as used in this Act, shall include all railroad companies, express companies, street railroads, suburban or interurban railroads, sleeping car companies, freight-line companies, equipment companies, pipe-line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state."

<sup>65</sup> MONT. REV. CODE (1921) § 3881. This Section is set out in the quotation from the case of *Public Service Commission of Montana v. Montana Water & Power Co.*, note 79 *infra*.

<sup>66</sup> ORE. CODE (1930) § 61-201. The definition in this Statute includes: telegraphs, telephones, street railroads or other street transportation as common carriers, heat, light, water and power. Exemptions: street transportation in cities of

Of course these Acts do not cover the same utilities listed in the Wisconsin Act, and make various exceptions both of which are set forth in the footnotes. The definitions of New Hampshire<sup>69</sup> and South Carolina<sup>70</sup> were patterned after

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less than 50,000 municipal owned utilities, and railroads furnishing heat, light, water or power, not for profit and where such services are not accessible from a municipal or public utility plant. The Statute also provides: "All corporations, companies, individuals, parties to an oral or written agreement for the payment by a public utility, for service, managerial, construction, engineering or financing fees, and having an affiliated interest, as defined in this act, with said public utility, hereby are declared to be public utilities." In Section 62-102 a "railroad" is defined as any concern operating a steam, electric railroad or interurban, bridge, terminal, union depot, and express. Private and logging railroads are excepted. Section 61-501 places booming companies under the jurisdiction of the Public Service Commission.

<sup>67</sup> R. I. GEN. LAWS (1923) c. 253, § 3665. "Corporation" and "person" are defined in a manner similar to definition in the Uniform Act. The term "public utility" is defined to include: railroads, street railroads, telegraphs, telephones, gas, electricity, water, heat, light and power. Municipal waterworks are exempted. "Common carrier" is defined as embracing the following corporations: railroads, street railways, express, freight line, dining-car, steamboat, power-boat, and ferries. "Railroad" and "street railway" are defined similarly to the New York definitions. "Plant or equipment," as used in this Statute, describes various articles used by a "public utility" in the conduct of its business.

<sup>68</sup> VA. CODE (1924) § 4067. This Statute includes within its provisions: telephones, heat, light, power, and water. It exempts: hotels furnishing heat, light, water or power "to a limited number of patrons out of its temporary surplus," and individual plants "which furnish lights or electrical current or other power to inhabitants or towns or territory adjacent thereto in which operatives or employees of such plants live, provided no public utility operates in such town or territory." Section 3881 of this Statute defines a "public service corporation" as including transportation and transmission companies, canal, turnpike and other internal improvement companies, gas, pipe line, electric light, heat, power, and water supply companies, and "all persons . . . corporations authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public, and shall exclude all municipal corporations and public institutions owned or controlled by the State." "Transportation company" includes any concern "owning, leasing, or operating, for hire a railroad, street railway, canal, steamboat, or steamship line; and also any freight car company, car association, car service association, or car trust, express company, or company, trustee or person in any way engaged in business as a common carrier, over a route acquired in whole or in part under the right of eminent domain." "Transmission company" includes "any company owning, leasing, or operating, for hire, any telegraph or telephone line." "Railroad" is defined as including railroads operated by steam, electricity, or other motive power.

<sup>69</sup> N. H. LAWS 1935 (House Bill No. 426, § 4). This Statute covers: telegraphs, telephones, light, heat, power, water, toll bridges, toll roads, and "any steam or other power boat engaged in the common carriage of passengers or freight."

<sup>70</sup> S. C. CODE (Michie, 1932) § 8252. This Statute defines "corporation" and "person" as they are usually defined in such statutes, except that "corporation"

the Wisconsin Act; but they introduce a new element. This element is indicated by the italicized part of the South Carolina Act which reads:

"(c) The term 'Public Utility,' when used herein, includes every corporation and person furnishing or supplying in any manner gas, electricity, heat, electric power, water and street railway service, or any of them, to the public, or any portion thereof, *for compensation.*"

What generalizations can we draw from this group of statutes? Of course, generalizations are dangerous because, as Mr. Justice Holmes once said, "to generalize is to omit."<sup>71</sup> But there are enough similarities to permit some. First, the statutes only purport to define public utilities for the purpose of regulation by the public service commissions. The common law definition has not been repealed. But the active litigation, so far as the common law is concerned, is becoming less important. Secondly, so far as regulation and control by the commissions are concerned, the definitions crystallize the concept around the utilities specifically named, except in the case of Oklahoma's "virtual monopoly" statute. Thirdly, without the aid of *Nebbia v. New York*, nearly every business listed, except the ice business in Oklahoma, has passed the muster of the United States Supreme Court.

What common-law concepts have been read into them? As above noted, some of the statutory definitions do not contain the phrase, "for compensation," which was an es-

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is defined to include both public and private corporations. From the part quoted, the Statute continues thus: "The term 'public or any portion thereof' as used herein, means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or any political sub-division of the State, to which the service is performed, or to which the commodity is delivered. . . ." and is subject to sections 8252 to 8255, inclusive. Section 8251 of this Statute confers jurisdiction on the Railroad Commission over railroads, express companies, and telegraphs; section 8263 confers jurisdiction on the Commission over inter-urbans; section 8289 confers jurisdiction on the Commission over telephones; and section 8542 confers jurisdiction on the Commission over telegraphs and express companies. Section 8199 defines a "railroad" as meaning a steam road, and a "railroad corporation" as any concern operating a railroad or any "common carrier upon any of the lines of railroads in this State (street railways and express companies excepted). . . ."

<sup>71</sup> *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273 (1908).

sential ingredient at common law.<sup>72</sup> This limitation, however, has been read into them by the courts.<sup>73</sup> Although this element is read into the statutes in the sense that one who gave away electricity to the public would not be subject to the jurisdiction of the public service commission, yet the addition of the phrase "for compensation" does more than codify the common law. It sometimes acts as a limitation. That is it cuts down the class that would otherwise be subject to commission regulation. This is illustrated in the case of mutual concerns furnishing utility services to their own members. Under statutes, like Wisconsin's, which do not contain the phrase "for compensation" and which make the furnishing of telephone service to the public the test, the courts have held that whether mutual telephone concerns were or were not public utilities depended upon the fact of publicness. That is, is the membership closed, or is the membership opened to the public or some portion of it.<sup>74</sup>

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<sup>72</sup> Mr. Justice Story said, in *Citizens' Bank v. Nantucket Steamboat Co.*, 5 Fed. Cas. 719, 725 (C. C. D. Mass. 1811), that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all of our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiae*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and, of course, his rights, duties and liabilities are of a very different nature and character from those of a common carrier."

<sup>73</sup> *Re Wisconsin Michigan Power Co.* (Wis. R. R. Com.) P. U. R. 1931B, 230, 241 (1931); *Barr v. Northern Ry. Co.* (Mont. Pub. Ser. Com.) P. U. R. 1933D, 74, 83 (1932).

<sup>74</sup> *Commonwealth Telephone Co. v. Carley*, 192 Wis. 464, 213 N. W. 469 (1927); *Re Five Mile Creek Telephone Co.* (Wis. R. R. Com.) P. U. R. 1918B, 526 (1917); *Batesville Telephone Co. v. Public Service Commission*, 38 Fed. (2d) 511 (D. C. S. D. Ind. 1930) (interpreting the Indiana Statute); *State Public Utilities Commission ex rel. Macon County Telephone Co. v. Bethany Mutual Telephone Association*, 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495, P. U. R. 1916A, 997 (1915); *State Public Utilities Commission v. Noble Mutual Telephone Co.*, 268 Ill. 411, 109 N. E. 298, Ann. Cas. 1916D, 897 P. U. R. 1915D, 770 (1915); *State Public Utilities Commission v. Noble*, 275 Ill. 121, 113 N. E. 910, P. U. R. 1917A, 520 (1916); *Sullwold v. Four Lakes Rural Telephone Co.* (Minn. Ry. & Warehouse Com.) P. U. R. 1918B, 147 (1917), *affirmed in State ex rel. Hilton v. Four Lakes Telephone Co.*, 141 Minn. 124, 169 N. W. 480, P. U. R. 1919B, 247 (1918); *Re Farmers' Mutual Telephone Co.*, 1 P. U. C. R. (New Jersey) 74, P. U. R. 1915C, 344 (1913).



But the phrases "for compensation" or "for hire" exempts the *mutual* from regulation regardless of the extent of its membership, or invitation to the public to join, because the members are broadly speaking partners sharing the expense of operating and are not compensating anyone for services.<sup>76</sup> In one jurisdiction, however, "compensation" has been interpreted to mean "that which is given or received as an equivalent, as for services, debt, work, loss, or suffering." In this jurisdiction it was said:

"The subscribers of the defendant company pay to the defendant in exchange or as an equivalent for telephone service an amount sufficient to cover the cost of operating and maintaining the plant; and, as we view the situation, the defendant is clearly rendering services for compensation."<sup>76</sup>

But jurisdictions of the "for compensation" group which hold that *mutuals*, regardless of the publicness of their membership, are not public utilities, hold that, in case of service rendered to nonmembers generally, even though at cost, they are public utilities to that extent.<sup>77</sup> Under statutes, like New York's, which use the phrase "for profit" instead of the phrase "for compensation," the *mutuals* would escape regulation even in the last situation.<sup>78</sup> The phrase "for profit" excludes all nonprofit concerns. A concern, however, which is in bankruptcy is still subject to regulation, if it was organized for profit, because the definitions include "lessees, trustees, and receivers appointed by any court whatsoever." From the footnotes, it will be noticed that a num-

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<sup>76</sup> Foxcroft & Sebec Telephone Co. v. Itself (Me. P. S. C.) P. U. R. 1931D, 59 (1931); State v. Public Service Commission, 272 Mo. 627, 199 S. W. 962, L. R. A. 1918C, 820, P. U. R. 1918C, 158 (1917); State v. Southern Elkhorn Telephone Co., 106 Neb. 342, 183 N. W. 562, P. U. R. 1921E, 33 (1921); Twin Valley Telephone Co. v. Mitchell, 27 Okla. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582 (1910); Limestone Rural Telephone Co. v. Best, 56 Okla. 85, 155 Pac. 901 (1916).

<sup>76</sup> Mountain States Telephone & Telegraph Co. v. Project Mutual Telephone & Electric Co. (Idaho P. S. C.) P. U. R. 1916F, 370 (1916).

<sup>77</sup> State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown, 323 Mo. 818, 19 S. W. (2d) 1048 (1929).

<sup>78</sup> Willibrand v. Falter (Mo. P. S. C.) P. U. R. 1927D, 709 (1927), *dictum*.

ber of statutes in their definitions have specifically exempted *mutuals* from regulation.

Secondly, the courts and commissions have interpreted the phrases "directly and indirectly to the public," "for or to the public," etc., so that they, and each of them, are the equivalent to the "holding out" doctrine at common law. This is forceably brought out by the commission case of *Public Service Commission of Montana v. Montana Water & Power Company*.<sup>79</sup> The *Montana* statute, as will be noted from the case, was much broader than the above quoted phrases. This case was a proceeding by the Public Service Commission to determine whether the respondent was a public utility subject to its jurisdiction. The respondent had an electric plant and sold its surplus electricity to three corporations: (a) its *alter ego*, (b) a public utility, and (c) a lumber company. The Commission held that the respondent was not a public utility within the meaning of the statute, saying:

"Section 3881, Revised Codes, Montana, 1921, provides:

"The term 'public utility,' within the meaning of this act, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, or control any plant or equipment or any part of a plant or equipment, within the state, for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal, heat, street-railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns or villages, or elsewhere, telegraph or telephone service. . . ."

"The question is whether or not the sale of electricity, under the circumstances exhibited here and to the corporations named constitutes a sale to 'others' within the meaning of the statute. In *Public Service Commission v. Valley Mercantile Co.*, 14 M. U. R. 250, P. U. R. 1921D, 803, 809-811, we said:

"This definition, not elsewhere limited by the language of the act, taken literally might put a legal end to the company's remonstrance for, by admitted facts it is a corporation owning and operating a plant

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<sup>79</sup> P. U. R. 1926A, 689, 691 (1925).

equipped to furnish, and furnishing, heat to other persons and corporations, perhaps not operated primarily for such purpose, but in practice so conducted as to deliver and furnish to others, and the 'other persons' here are at least twelve in number. And this would seem at first blush to meet the statute's test. *But it is plain to anyone familiar with public utility law that not every person who owns a plant equipped for the production of steam heat and who furnishes one or two other persons with the product can lawfully be said to operate a public utility.* . . . Resort to the fundamental principles underlying the statute and necessarily influencing it, makes it clear that the right of regulation depends upon a profession of public service, and unless this appears in fact the statute is without any application. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. Wyman has made this clear in his work on public service corporations: (Vol. 1, § 200, pp. 167, 168.)

"It should be remembered in justification of the imposition of the extraordinary law which requires those who are engaged in public callings to serve all that apply, that the service is voluntarily assumed. Even one who has acquired a virtual monopoly is not forced into public service against his will; *it is only when he has held himself out in some way as ready to serve that he is bound thereafter to deal with all indiscriminately.* There is no complete case of public employment made out when the business is public in character if there *has been in the particular case no profession to serve the public.* The converse of this is also true, that there is no case of public employment if the business is private in character, however much eagerness to deal with the public may have been evinced. That is, the rule is fundamental that in any case of public employment the evidence of *profession to serve the public* and the *proof that the business is public* in character *must both be sufficient to carry conviction.* For whether there has been profession enough in the particular instance and whether the business is sufficiently public in its general character is in each instance in last analysis a question of fact, although rules of law may aid in dealing with these facts. And since this is a question of fact rather than a question of law in most cases, the discussion of it requires the statement of many cases involving many close issues of fact. For although the public profession is often enough made in express terms, it is also not infrequently left to implication from the general course of business in question." (Italics are the Commission's.)

Two more questions remain to be answered: First, what is the "public utility"? Is it the equipment which is owned, operated, etc., by persons, corporations, etc.? Or are the persons, corporations, etc., which own and operate certain equipment in a certain manner, the "public utility"? Sec-

only, if it is the second, at what point does the concern become a "public utility"? The case of *State ex rel Marshall v. Wyandotte County Gas Co.*<sup>80</sup> answers the first question and says that it is the "person, corporation, etc.," and not the equipment. The Kansas definition contained this exemption:

"Nothing in this Act shall apply to any public utility in this State owned and operated by any municipality. The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in section 33 of this Act."<sup>81</sup>

In this case the Public Utilities Commission undertook to fix the rates of the Appellant in the cities of Kansas City and Rosedale. The appellant resisted and contended that it fell within the last of the above quoted exceptions. The Supreme Court of Kansas said:

"It is contended by the state that the term 'public utility' wherever used in the Act means just what the Legislature, in Section 3, has defined it to mean, *viz.*: 'Every corporation, company, individual, association of persons, their trustees, lessees, or receivers,' etc.

"On the other hand, the appellant contends that the term is used in the last two sentences in section 3 in a different meaning, *viz.*, the pipes and other physical properties by means of which the public is served, and that, as these physical properties are separately and independently situated and operated in the two cities, there is a separate and distinct public utility in each city which each city, respectively, has authority to control and regulate, and over which the Public Utilities Commission has no jurisdiction. It is urged that the meaning of 'public utility,' defined in section 3, could not be applied to the next to the last sentence in the section, which provides, in substance, that the Act shall not apply to any public utility owned and operated by any municipality. It is said that a municipality could not own and operate a 'corporation, company, individual, association of persons,' etc. Again, it is said that the qualifying words, 'situated and operated wholly or principally within any city,' etc., by common usage relate to physical objects, and not to corporations, companies, etc. As ap-

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<sup>80</sup> 88 Kan. 165, 127 Pac. 639 (1912).

<sup>81</sup> See note 64, *supra*.

plied in these two sentences, the defined meaning of the term cannot be said to have been fortunate, or, rather, the two sentences cannot be said to have been fortunately constructed with reference to such meaning. A reading of the entire Act, in which the term 'public utility' is frequently used, shows the intent of the Legislature to use the term with the meaning defined even in the two sentences referred to. For instance, in the first sentence of section 33 it is provided, in substance, every municipal council or commission shall have the power and authority to contract with any public utility, situated and operated wholly or principally within any city, etc. The qualifying words are the same as used in the last sentence of section 3, yet it would be absurd to suppose that authority was intended to be granted to a municipal council or commission to contract with pipes or other physical properties employed in operating the business."

In answer to the second question, the Wisconsin Supreme Court has held that a corporation which owned electrical facilities with the intention of furnishing electricity to the public, but which had not yet begun to do so, nor had not yet obtained a certificate of convenience and necessity, was, nevertheless, a "public utility" within the meaning of the statute.<sup>82</sup> The decision seems right because the statute reads, "that may own." The Uniform Act and kindred acts are a little clearer on that point. They read, "that now or may hereafter own."

The statutory definitions of New Jersey<sup>83</sup> and Tennessee<sup>84</sup> were modeled after the Wisconsin Act, and what has been said above is applicable to them also. But they contain a further limitation. In New Jersey only those utilities which operate "under privileges granted or hereafter to be

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<sup>82</sup> *Wisconsin Traction, etc., Co. v. Green Bay & Miss. Canal Co.*, 188 Wis. 54, 205 N. W. 551 (1925).

<sup>83</sup> *New Jersey Public Utility Act* (P. L. 1911) § 15, as amended by P. L. 1925, c. 146, P. L. 1921, c. 149. This Statute includes: steam railways, street railways, traction railways, auto bus, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone and telegraph systems. The Commission is given jurisdiction over toll bridges by P. L. 1913, p. 614, and over Radio Broadcasting Stations and Transmitters by P. L. 1930, c. 15.

<sup>84</sup> *TENN. CODE* (Michie, 1932), 1935 Supp., § 5448. This Statute includes: "any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph." It excludes: United States Government owned or controlled utilities, municipally owned utilities, and *mutuals*. Section 5415 of Michie's Tennessee Code of 1932 gives the Commission jurisdiction over railroads.

granted by the State of New Jersey or by any political subdivision thereof" are included in the definition. The Tennessee clause reads, "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof." These clauses of limitation, when examined, turn out to be negligible. In the case of *Acquackanonk Water Co. v. Board of Public Utility Commissioners*<sup>85</sup> the New Jersey Court, in holding that a wholesale water company was included in the definition, said:

"As to the East Jersey Water Company having privileges from the State or municipalities, I think it enough to say that it has the privilege of being a corporation from the State, which is enough to authorize special treatment for the purposes of taxation, and it has the privilege of doing business in the various municipalities and distributing water therein."

It would be hard to imagine a case where much business is done without the exercise of a franchise or license from the state, county, or city.

North Dakota<sup>86</sup> and West Virginia<sup>87</sup> fall in this group in that their public utility acts are not continuations of their

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<sup>85</sup> 97 N. J. L. 366, 118 Atl. 535 (1922), *re-examined and approved in* East Jersey Water Co. v. Board of Public Utility Commissioners, 98 N. J. L. 449, 119 Atl. 679 (1923).

<sup>86</sup> N. D. Laws 1919, c. 192, § 2. This Act enumerates: "(a) common carriers, railroads, street railways, express companies, sleeping car companies, toll bridges, ferries, and steam and other boats engaged in the transportation of freight and passengers; (b) telegraph and telephone companies engaged in the transmission of messages and conversation; (c) pipe line companies for the transportation of gas, oil and water; (d) electric light companies for the purpose of distributing light, heat or power; (e) gas companies for the manufacture or distribution of gas, natural or artificial; (f) water companies for the storage and distribution of water for domestic and all beneficial uses; (g) all heat companies for the distribution of heat; (h) ware-house, packing and cold storage companies for the marketing, storage or handling of food and other agricultural products; (i) stock yard companies engaged in the business of caring for, feeding and watering live stock; (j) all other public utility corporations and all persons, associations, corporations, or agencies employed or engaged in any of the businesses hereinafter enumerated."

<sup>87</sup> W. VA. CODE (1931) c. 24, Art. 1, § 1. Section 1 of Article 2 of this Statute gives the Commission jurisdiction over the following public services: "Common carriage of passengers and goods, whether by railroad, street railroad, motor or otherwise, by express or otherwise, by land, water or air, whether wholly or partly by land, water or air; transportation of oil, gas or water by pipe line; sleeping car or parlor car services; transmission of messages by telephone, telegraph or radio;

earlier railroad laws. The North Dakota Act enumerates a number of utilities and continues:

"The words 'public utility' used in this Act shall include all associations, persons, firms, corporations, and agencies engaged or employed in any business herein enumerated or in any other public utility business, whether above enumerated or not and whether incorporated or not."

The West Virginia Act reads:

"Except where a different meaning clearly appears from the context, the words 'public utility' when used in this chapter shall mean and include any person or persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service."

Now these definitions get us back in the legal snarl described by Professor Robinson in his article. Suppose the Public Service Commission of West Virginia should decide that oil companies and coal companies had a virtual or economic monopoly and should call upon them to cease and desist from business until they should obtain a certificate of convenience and necessity. And in my judgment the fact of an economic monopoly could be established. Would the doctrine of *Nebbia v. New York* sustain the order? True, that *Nebbia v. New York* lays emphasis on the "declared policy of the state"; but has not the policy been impliedly declared in the statute? As a practical matter, however, the question will probably never be raised because the businesses which the legislatures, in both states, wish the public service commissions to begin upon have been enumerated and we all know the policy of the courts and commissions to wait for the legislature to add to the list and not to take the initiative themselves.

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generation and transmission of electrical energy by hydro-electric or other utilities for service to the public, whether directly or through a distributing utility; supplying water, gas or electricity, by municipalities or others; toll bridges, wharves, ferries; and any other public service except vehicular service upon streets and roads."

The second group of statutes have followed the lead of New York.<sup>88</sup> Roughly these statutes have merely added definitions of other utilities to the railroad definition, which, in some cases, have been revised. The New York Act provides as follows:

"Sec. 3. The term 'corporation,' when used in this chapter, includes a corporation, company, association and joint-stock association.

"Sec. 4. The word 'person,' when used in this chapter, includes an individual, and a firm or copartnership.

"Sec. 5. The term 'street railroad,' when used in this chapter, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including all equipment, switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated or owned by or in connection with any such street railroad; but the said term 'street railroad,' when used in this chapter, shall not include a railroad constituting or used as part of a trunk line railroad system.

"Sec. 6. The term 'railroad,' when used in this chapter, includes every railroad, other than a street railroad, by whatever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, equipment, switches, spurs, tracks, stations and terminal facilities of every kind used, operated or owned by or in connection with any such railroad.

"Sec. 7. The term 'street railroad corporation,' when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith.

"Sec. 8. The term 'railroad corporation' [same definition as that in Section 7]. . . .

"Sec. 9. The term 'common carrier,' when used in this chapter, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping car companies, freight companies, freight-line companies, baggage companies, transfer companies, carriers

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<sup>88</sup> N. Y. CONSOL. LAWS (Cahill, 1930) c. 49, § 2, N. Y. CONSOL. LAWS (Cahill's 1931-1935 Cum. Supp.) c. 49, § 2. I have omitted wherever possible without destroying the meaning. New York's definition of omnibuses will be treated in the section of this Article dealing with motor carriers.



by water, and every corporation . . . owning, operating or managing any such agency for public use in the conveyance of persons or property within this state; but the said term common carrier, when used in this chapter, shall not include an express company, baggage company or transfer company unless the same is operated wholly or in part upon or in connection with a railroad or street railroad. Nor shall the said term common carrier, when used in this chapter, be deemed to include a municipally owned ferry nor a ferry company operating under a lease from a city nor a carrier by water except where such carrier by water is engaged or may be required to be engaged with a carrier or carriers by railroad in the transportation of passengers or property over a through route partly by water and partly by railroad for a continuous carriage or shipment between points in this State. . . .

"Sec. 9a. The term 'baggage company' shall apply to those companies engaged under contract or agreement with a railroad company or a street railroad in checking of baggage, or in the collection and delivery of baggage between railroad stations, or between railroad stations and hotels, residences, business places or steamer docks; and the term 'transfer company' shall apply to companies engaged under contract or agreement with a railroad company or street railroad company in the transfer of passengers or property between railroad stations, or between railroad stations and hotels, residences, business places or steamer docks. . . .

"Sec. 10. The term 'gas plant,' when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured or mixture or both) for light, heat or power. . . .

"Sec. 11. The term 'gas corporation,' when used in this chapter, includes every corporation . . . owning, operating or managing any gas plant except where gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its own tenants and not for sale to others.

"Sec. 12. The term 'electric plant' [practically analogous to the definition of "gas plant"] . . .

"Sec. 13. The term 'electric corporation' [same definition as that in section 11 with the exception, 'other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others'] . . .

"Sec. 14. The term 'transportation of property,' when used in this chapter, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported.

"Sec. 15. The term 'line,' when used in this chapter, includes 'route.'

"Sec. 16. The term 'municipality,' when used in this chapter, includes a city, village, town or lighting district, organized as provided by a general or special act.

"Sec. 17. The term 'telephone corporation' [analogous to the definition of a "gas corporation" with the following exception: "who or which do not operate the business of affording telephonic communication for profit"] . . . .

"Sec. 18. The term 'telephone line,' when used in this chapter, includes conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated or owned by any telephone corporation to facilitate the business of affording telephonic communication. . . .

"Sec. 19. The term 'telegraph corporation' [analogous to the definition of a "telephone corporation" without the exception]. . . .

"Sec. 20. The term 'telegraph line,' [analogous to the definition of "telephone line"] . . . .

"Sec. 21. The term 'steam plant,' when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of steam for heat or power. . . .

"Sec. 21 [Added by Laws 1913, c. 506.] The term 'stock yard,' when used in this chapter, includes all real estate, fixtures and personal property owned, used or to be used in connection with the business of affording facilities for the shipment of live stock and for the care thereof for such purpose prior to the time that transportation begins; and the term 'stock yard company' includes every corporation . . . operating or managing a stock yard. . . .

"Sec. 22. The term 'steam corporation' [analogous to the definition of a "gas corporation"] . . . .

"Sec. 22 [Added by Laws 1913, c. 505.] The term 'utility company' or 'public utility company' is used to avoid repetitions in a provision applying to one or more persons or corporations operating an agency or agencies for public service, and who or which is or are subject to the jurisdiction, supervision and regulations prescribed by or pursuant to this chapter; such term being so used only as a general term descriptive of such a person or corporation. . . .

"Sec. 23. The term 'utility corporation' or 'public utility corporation' is an incorporated utility company. . . .

"Sec. 26. The term 'water system,' when used in this chapter includes all real estate, attachments, fixtures, impounded water, water-works, water plant, water rights and personal property, and all property either real, personal or mixed, owned, operated, used or to be used for or in connection with or to facilitate the distribution, sale or furnishing of water for domestic, commercial or public uses, but does not include property used solely for or in connection with the business of bottling or selling, distributing or furnishing bottled water. . . .

"Sec. 27. The term 'water-works corporation,' when used in this chapter includes every corporation . . . excepting such as have a property value of ten thousand dollars, or less, owning, operating or managing any water plant or water-works except where water is distributed solely on or through private property solely for the use of the distributor or its tenants and not for the sale to others. . . ."

It is obvious that there is much needless repetition in this Statute, and to cap the climax the courts say that it is necessary for them to resort to the dictionary in order to find out what is meant by such terms as "railroad," etc.<sup>89</sup> Secondly, the long tedious enumeration of the different parts of gas plants, electric plants, etc., is needless, because only such equipment which is used and useful as a matter of fact is subject to rate regulation anyway. Furthermore such equipment would be implied in the term electric plant, gas plant, etc. The issuance of securities depends on the property owned, or earnings, and the enumeration in the statute could not possibly be of any aid. As a matter of skillful draftsmanship, according to the late Dr. Ernst Freund, the fewer the words the better. The more words used, and especially needless ones, the greater the danger there is for the legislative purpose to be defeated by construction. For example, in the definition of a telephone line there is danger of a court applying the maxim, *expressio unius est exclusio alterius*, and limiting the jurisdiction of the Commission to the specific articles named, and holding that such general terms as "instruments, machines, appliances and all devices" refer to the specific articles named. All of us will readily recall the constitutional argument that Congress has only

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<sup>89</sup> People ex rel. Kelly v. Public Service Commission, 157 N. Y. S. 703 (1916).

the powers enumerated and that no new power was added by the "general welfare clause." If that construction was made here the Commission would have no authority to value new inventions unless the Statute was amended to include it. Effective regulation would be thwarted. Wisconsin has avoided that pitfall by using only generic terms. Yet states with statutes similar to the New York Statute have held that their commissions had jurisdiction over telephone directories, which are not specifically listed.<sup>90</sup> The Illinois Supreme Court refused to apply the maxim so as to deny jurisdiction of the Illinois Commission over a cold storage warehouse, although it was not enumerated or implied in the statutory definition of the term "warehouse," but held that jurisdiction was found in another part of the definition of public utilities.<sup>91</sup> The New York courts have held, however, that the phrase "any such agency" would not include any common carrier other than those specifically mentioned.<sup>92</sup> On the whole, it is fair to say that since the definition of a "telephone line" has been on the statute book for twenty-five years, it is a fair presumption that it is a workable definition. The proof of the pudding is the eating thereof.

The New York definitions have practically been copied in the District of Columbia,<sup>93</sup> California,<sup>94</sup> Idaho,<sup>95</sup> Maine,<sup>96</sup>

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<sup>90</sup> *California Fireproof Storage Co. v. Brundige*, 199 Cal. 203, 248 Pac. 669 (1926); *Baldwin v. West*, 160 Md. 202, 152 Atl. 907 (1931).

<sup>91</sup> *Public Utilities Commission v. Monarch Refrigerating Co.*, 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528, P. U. R. 1915D, 119 (1915).

<sup>92</sup> *People ex rel. Kelly v. Public Service Commission*, *op. cit. supra* note 89.

<sup>93</sup> 37 STAT. 974 (1913). Section 8 of this Statute includes: "every street railroad, street railroad corporation, common carrier, gas plant, gas corporation, electric plant, electrical corporation, water-power company (for generating and distribution of electricity), telephone corporation (furnishing services "for hire"), telephone line, telegraph corporation, telegraph line, and pipe line company"; it excludes interstate carriers. The Act also provides: "Corporations formed to acquire property or to transact business which should be subject to the provisions of this Section, and corporations possessing franchises for any of the purposes contemplated by this Section shall be deemed to be subject to the provisions of this Section, although no property may have been acquired, business transacted, or franchises exercised."

<sup>94</sup> CAL. GEN. LAWS (1915) c. 91, p. 115. This Act, with amendments thereto, defines: Corporation, person, transportation of persons, transportation of property,

Maryland,<sup>97</sup> Missouri,<sup>98</sup> Utah,<sup>99</sup> and Washington.<sup>100</sup> However, there appears at first blush to be a radical difference

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street railroad, street railroad corporation, railroad, railroad corporation, express corporation, freight forwarder, common carrier (excludes inland tank vessels transporting for parent corporation only), pipe line, pipe line corporation, gas plant, gas corporations, electrical plant, electrical corporation, telephone line, telephone corporation (furnishing service for "compensation"), telegraph line, telegraph corporation, water system, water corporation, vessels, wharfinger, warehouseman, heating, heat corporation (with the same exception as in case of a gas corporation), and "public utility" which is declared to include the above list "where the service is performed for or the commodity delivered to the public or any portion thereof." "The term 'public or any portion thereof' as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality or other political sub-division of the state . . . and whenever (the above list) performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such (the list) is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the Commission and the provisions of this act. . . ." The Statute then declares that a wholesaler is a public utility. (As amended by Section 1, c. 784, Cal. Laws 1933.) The definition of "warehouseman" was broadened in 1927 (Cal. Laws 1927, c. 878, p. 1918) to include all storing for the public for compensation "other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor" and "excepting warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of agricultural products of its members. . . ."

<sup>95</sup> IDAHO CODE (1930) §§ 59-104 through 59-129. This Act includes: corporation ("but does not include a municipal corporation, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit"), person, transportation of persons, transportation of property, street railroad, street railroad corporation, railroad, railroad corporation, express corporation, common carrier, pipe line, pipe line corporation, gas plant, gas corporation, electric plant, electrical corporation (with same exception as in gas corporation plus electricity used in mining, and consumers' associations), telephone line, telephone corporation, telegraph line, telegraph corporation, water system, water corporation, vessel, wharfinger, warehouseman, and public utility, the latter declaring that such of the above list that furnish services or commodities "to the public or any portion thereof" for compensation are public utilities; also includes wholesalers.

<sup>96</sup> ME. REV. STAT. (1930) c. 62, § 15. This Act, with amendments thereto, includes: corporation, person, transportation of persons, transportation of property, street railroad, street railroad company, railroad, railroad company, express company, common carrier, gas plant, gas company, electric plant, electrical company, telephone line, telephone company, telegraph line, telegraph company, waterworks, water company, vessel, wharfinger, warehouseman, and public utility, the latter declares that the above list of companies as defined to be public utilities and subject to the jurisdiction of the Public Utilities Commission. Steam and electrical railroads are defined as including terminal companies, and public heating companies.

<sup>97</sup> MD. ANN. CODE (Bagby 1924) Art. 23, § 346. This Act defines: corporation, person, railroad, street railroad, railroad corporation, street railroad corporation, common carrier, gas corporation (without the exception in the New York definition), electrical corporation ("other than a railroad or a street railroad corporation

by the omission of three little words, "for public use," in the various definitions of the Maine, Missouri, and Washington statutes. But the courts say that they are "impliedly" in the statutes; so the difference disappears. This problem is thoroughly dealt with by the following quotation from the case of *State v. Public Service Commission*:<sup>101</sup>

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generating electricity for its own use solely and exclusively"), gas plant, electric plant, transportation of property or freight, telephone company (furnishing services "for hire"), telegraph company, telephone lines, telegraph lines, water company, heat or refrigerating company. Section 348 defines toll bridges.

98 MO. REV. STAT. (1929) § 5122. This Act defines: corporation, person, street railroad, railroad, street railroad corporation, railroad corporation, common carrier, gas plant, gas corporation (limited to those operating "under privilege, license, or franchise . . . granted by the state or any political sub-division, county, or municipality thereof"), electric plant, electrical corporation ("other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others" and "except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others"), transportation of property, line, municipality, telephone corporation (furnishing services "for hire"), telephone line, telegraph corporation, telegraph line, water corporation, water system, express corporation, transportation of persons, and public utility which declares the above list of corporations and carriers to be public utilities and subject to the jurisdiction of the Public Service Commission.

99 UTAH REV. STAT. ANN. (1933) Tit. 76, c. 2, § 1. This Act defines: corporation, municipal corporation, person, transportation of persons, transportation of property, street railroad, street railroad corporation, railroad, railroad corporation, express corporation, aerial bucket tramway corporation, common carrier, heating plant, heat corporation, gas plant, gas corporation, electric plant, electrical corporation, telephone line, telephone corporation (operating for the public use within the State), telegraph line, telegraph corporation, water system, water corporation ("provided this shall not apply to private irrigation companies engaged in distributing water only to their stockholders"), warehouseman, and public utility which declares the above list to be public utilities and includes wholesalers.

100 WASH. REV. STAT. (Remington, 1922) § 10344. This Act defines: corporation, person, street railroad, street railroad company, railroad company, express company, common carrier, gas plant, gas company (without the New York exception), electric plant, electrical company (with the Missouri exception), transportation of property, transportation of persons, service, telephone company (furnishing services "for hire"), telegraph company, telegraph line, water system, water company, vessel, steamboat company, dock or wharf, warehouse, wharfinger or warehouseman, and public service company which includes the above list of concerns as above defined. The Attorney-General ruled, on May 2, 1927, that an electric company furnishing two companies with electricity under special contracts, does not hold itself out as willing to serve others, is not a public service company and need not file an annual report.

<sup>101</sup> 275 Mo. 483, 205 S. W. 36, 39, 40, 18 A. L. R. 754, 759, 760, P. U. R. 1919A, 353 (1918).

"It is contended by appellants that the whole question is settled by subdivisions 12 and 13 of Section 2 of Public Service Commission Act, which define an 'electric plant' and an 'electrical corporation,' over which plants and aggregations, as defined, other appropriate provisions of this Act (subdivision 25, § 2, p. 560, Laws 1913), confer plenary powers of regulation. The above clauses read thus:

"The term "electrical plant," when used in this Act, includes all real estate, fixtures and personal property operated, controlled, owned, used, or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."

"The term "electrical corporation," when used in this Act, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad purposes or for its own use or the use of its tenants and not for sale to others."

"While the definitions quoted, *supra*, express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words 'for public use' are to be understood and to be read therein. *State ex rel. v. Spokane, etc., Co.*, 89 Wash. 599 [L. R. A. 1918C, 675, P. U. R. 1916D, 469] 154 Pac. 1110. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. Since the sole right of regulation depends upon the public interest, the subdivisions quoted above, and which define an electric plant and an electrical corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity connoted and to be understood therein. We are not to be understood as saying that an electric plant constructed solely for private use could not, by professing public service, become by such profession, and by the furnishing of general public service, a public utility."

In *Clark v. Olson*<sup>102</sup> the Washington Supreme Court had before it the question of whether or not the sale by an in-

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102 177 Wash. 237, 31 Pac. (2d) 534, 93 A. L. R. 240 (1934).

dividual of water to a few of the inhabitants of Rockport made him a public utility. The Court found that his sales had been incidental, and that Olson had never held himself out to serve the public nor any portion of it. The Court evidently took it for granted that "public use" was implied by the statute. The Court said:

"The test to be applied is whether or not the petitioner held himself but, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. . . ."

Although this paper does not deal with federal utilities, I believe that one is safe in saying that the idea embodied in the New York definitions was obtained from the Interstate Commerce Commission Act of 1887 and the early amendments thereof.<sup>103</sup> The Interstate Commerce Commission Act, like the New York Act, defined "common carriers" by stating that it included a list of utilities operated in connection with railroads. "Railroad" was defined as including a long list of equipment and facilities necessary for the operation of a railroad. "Transportation" is defined as including all instrumentalities used in handling, icing, etc.

Although the definitions of Arizona,<sup>104</sup> Connecticut,<sup>105</sup> Illinois,<sup>106</sup> Ohio,<sup>107</sup> and Pennsylvania<sup>108</sup> are not "copies"

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<sup>103</sup> 8 U. S. COMP. STAT. § 8563 (2). Subsequent to the adoption of the New York Act, the Interstate Commerce Commission Act has been amended to include "transmission" which is defined as including "the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages." U. S. C. A. Title 49, § 1.

<sup>104</sup> ARIZ. CONST. art XV, § 2. This Section of the Arizona Constitution provides: "All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes;



or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations." Section 10 provides: "Railways heretofore constructed, or that may hereinafter be constructed, in this State, hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations, for the transportation of persons, or of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law." These sections include "persons" operating a public utility. *Van Dyke v. Geary*, 244 U. S. 39, 37 S. Ct. 483, 61 L. Ed. 973. (1917).

Struckmeyer's Revised Code of Arizona (1928), Section 673, defines: Transportation of persons, transportation of property (includes "the transmission of credit by express corporations"), street railroad, railroad, express corporation, pipe line, gas plant, electric plant, telephone line, telegraph line, and water system. None of these definitions include anything which would not be implied by the common law except the transmission of credit by express corporations. None of these definitions nor the ones mentioned and described in the Constitution make "furnishing to the public" a prerequisite to jurisdiction by the Commission, although it is certain that it would be read in by the Courts.

105 CONN. GEN. STAT. (1930) § 3577. This Statute defines: common carrier, public service company "shall include railroad, street railway, electric, gas, telephone, telegraph and water companies, owning, leasing, maintaining, operating, managing or controlling plants or parts of plants or equipment, and all express companies having special privileges on railroads, or street railways within this State, but shall not include towns, cities, boroughs or any municipal corporation or department thereof whether separately incorporated or not," plant, railroad company, street railway company, electric company, gas company, and water company.

106 ILL. REV. STAT. (Cahill, 1935) c. 111a. § 25. This Statute defines "public utility" in a manner similar to the Wisconsin Act. It includes "(a) . . . any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of grain; or for the conduct of the business of a wharfinger or that (b) may own or control any franchise, license, permit or right to engage in any such business. It excludes "such public utilities as are or may hereafter be owned or operated by any transportation district or other municipality, and . . . such telephone company . . . which are or may hereafter be purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such company. . . ." It resembles the New York Act in that it specifically defines the following terms in manner quite similar to the latter Act: common carrier, railroad, street railroad, transportation of persons, transportation of property, express company, company, corporation, person, warehouse, wharfinger, and service.

107 OHIO GEN. CODE (Throckmorton, 1926) § 501. This Statute defines "railroad" as including "all corporations . . . their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this State . . . any bridges, terminals, union depots, side tracks, wharves, or storage elevators used in connection therewith . . . and embrace express companies, water transportation companies and interurban railroad companies. . . ." Section 502 provides: "This chapter shall apply to the transportation of passengers and property between points within this State, to the

of the New York Act, yet they were patterned after the New York Act with a sprinkling of the Wisconsin legislation thrown in. These definitions present no new problem, except that Illinois has read the doctrine of *ultra vires* into her law of public utilities. Every other jurisdiction, to my knowledge, follows the rule aptly phrased by Mr. Justice Holmes in the case of *Terminal Taxicab Co. v. Kutz*:<sup>109</sup>

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receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all (except individuals) which do business as common carriers, upon or over a line of railroad within this State, and to common carrier . . . by rail or partly by rail and partly by water or wholly by water. . . ." Section 503 provides: "This chapter shall not apply to street and electric railroads" operated "within the limits of cities. . . ." Section 614-2 provides: "Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated: When engaged in the business of transmitting to, from, through or in this State, telegraphic messages, is a telegraph company. . . ." This Section also defines: telephone company, electric light company, gas company (excepting wholesalers who manufacture gas as a by-product), natural gas company (except wholesalers who own the land in fee where the gas is obtained or where the principal use of the land is other than the production of natural gas), pipe line company, water works company, messenger company, signaling company, street railroad company, suburban and interurban railroad company. Section 614-2a defines a "public utility" as including the above list and *excepts* "such public utilities as operate their utilities not for profit" and those owned by municipalities.

<sup>108</sup> PA. STAT. (Purdon, 1936) Tit. 66, § 1. This Statute provides: "The term 'Public Service Company,' when used in this Act, includes all railroad corporations" and canal, street railway, stage line, express, baggage transfer, pipe line, and ferry corporation, common carriers, and pullman car, dining car, tunnel, turnpike, bridge, wharf, incline plane, grain elevator, telegraph, telephone, natural gas, artificial gas, electric, water, water-power, heat, refrigerating, and sewage corporations, doing business within the State, and also all persons engaged for profit in the same kind of business "within this Commonwealth." The Act exempts one furnishing electricity, gas, water, steam, "or other substance for heat or power" to his own use or for his tenants. The Act defines: corporation, municipal corporation, person, railroad corporation, street railway, common carrier, conveyance of passengers and property, service, and facilities. This latter defined term avoids the repetition found in the New York Act. The Statute also states that municipally-owned utilities are excepted unless specifically mentioned.

<sup>109</sup> 241 U. S. 252, 60 L. Ed. 984, Ann. Cas. 1916D, 765, P. U. R. 1916D, 972 (1916). Accord: *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 63 L. Ed. 613 (1919); *Smitherman & McDonald v. Mansfield Hardwood Lumber Co.*, 6 Fed. (2d) 29, P. U. R. 1926A, 71, (1925); *Calder v. Walker* (Conn. Pub. Util. Com.) P. U. R. 1920E, 191 (1920); *State v. Public Service Commission*, *op. cit. supra* note 101; *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 320 Mo. 1146, 9 S. W. (2d) 589, P. U. R. 1929A, 106 (1928); *Barr v. Great Northern Ry. Co.* (Mont. Pub. Ser. Com.) P. U. R. 1933D, 74

"The plaintiff is a Virginia corporation, authorized by its charter, with copious verbiage, to build . . . but not to exercise any powers of a public service corporation. It does business in the District, and the important thing is what it does, not what its charter says."

On the other hand the Illinois Court had this to say in the case of *State Public Utilities Commission v. Okaw Valley Mut. Tel. Ass'n*,<sup>110</sup> which was a proceeding on the part of the State Public Utilities Commission to restrain the Okaw Valley Mutual Telephone Association from operating until it had secured a certificate of convenience and necessity:

"It is not a public utility corporation within the meaning of said Act, and it has no right or power, under its charter, to serve the public with telephone service, as could a public utility corporation organized and equipped to give the public such telephone service. It can only exercise the rights and powers granted by its charter, and would be subject to a penalty and a forfeiture of its franchise if it should assume to act or to serve the public generally as a telephone company organized and chartered to serve the public for hire. It had no right to a 'certificate of convenience and necessity' under section 55 or under any other section of the Act, and could not legally have obtained one without first obtaining a new charter, if it had applied in person to the Commission for such certificate . . . If it be true that appellee has violated its charter or usurped rights and powers not granted to it, such violations cannot have the effect to make it a public utility."

The third group has been selected not because there is any great uniformity in their definitions but because they

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(1932); *Affiliated Service Corporation v. Public Utilities Commission*, 127 Ohio St. 47, 186 N. E. 703 (1933); *Pennsylvania Chautauqua v. Public Service Commission*, 105 Pa. Super. Ct. 160, 160 Atl. 225, P. U. R. 1932D, 145 (1932); *State ex rel. Silver Lake Ry. & Lumber Co. v. Public Service Commission*, 117 Wash. 453, 201 Pac. 765, P. U. R. 1922B, 314 (1921); *Commonwealth Telephone Co. v. Carley* 192 Wis. 464, 213 N. W. 469, P. U. R. 1927C, 164 (1927); *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489, 240 N. W. 418 (1932).

Charter authority to engage in the public utility service is a relevant fact to be considered with the other facts in determining whether or not the concern is "holding itself out" to serve the public. *Williamson v. Railroad Commission*, 193 Cal. 22, 222 Pac. 803 (1924).

The mere act of incorporating under the Statute *ipso facto* makes the corporation a public utility. *Traber v. Railroad Commission*, 183 Cal. 304, 191 Pac. 366 (1920).

<sup>110</sup> 282 Ill. 336, 118 N. E. 760, P. U. R. 1918C, 583 (1918). Accord: *People v. Public Service Commission*, Second Dist., 226 N. Y. 527, 124 N. E. 105 (1919). The Illinois Court was quoted with approval in a mutual telephone case in *State v. Southern Elkhorn Telephone Co.*, 106 Neb. 333, 183 N. W. 562 (1921).

have not progressed beyond the railroad age. In these states the public service commissions have jurisdiction over railroads, connected utilities, telegraphs, telephones, and a few include pipe lines and steamboats. But jurisdiction has not been extended to cover the modern and important utilities of gas, electricity, and water. This group consists of Florida,<sup>111</sup> Minnesota,<sup>112</sup> Mississippi,<sup>113</sup> Nebraska,<sup>114</sup> South Dakota,<sup>115</sup> and Texas.<sup>116</sup>

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<sup>111</sup> FLA. COMP. LAWS (1927) § 6701. This Statute defines: railroad, railroad company (which includes utilities operated in connection with a railroad), and transportation. Section 6702 defines common carrier (which includes railroads, steamships, power boats over ten tons, terminal and depot companies). Section 6358 defines, in New York fashion: corporation, person, service, telephone company, telephone line, telegraph company, and telegraph line. Sections 2744 and 2745 extend the jurisdiction of the Commission over certain toll bridges.

<sup>112</sup> MINN. STAT. (Mason, 1927) c. 28, § 4628. This Statute gives the Commission jurisdiction over "railroads and express companies doing business as a common carrier, and of public warehouses." Section 4816 provides: ". . . the term 'street railway' . . . shall mean and apply to any association or corporation, leasing, holding, owning, managing, operating or otherwise controlling any street railway line or street railway property wholly or partly within this State. . . ." Section 5255 provides: "'Public stockyards' as used herein means all stockyards into which live stock is received for the purpose of exposing the same for sale or for feeding the same and doing business for compensation. . . ." Section 5287 provides: "The term 'telephone company' as used in this Act shall mean and apply to any person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly in this State, or furnishing any telephone service to the public." For the purpose of defining the Commission's jurisdiction to cooperate with the Interstate Commerce Commission, Section 4722 defines common carriers as including "all common carriers engaged in the transportation of persons or property between places within this State by railroad, or partly by railroad and partly by water, when both are used under a common control . . . or arrangement for such carriage . . . whether carrier owns or operates the line . . . over which such passengers or freight are transported, or carries the same . . . in the cars of any other company . . . but shall not include street railways. . . ." And Section 4723 defines railroad as including various equipment; "and the term 'transportation' shall include all instrumentalities of shipment or carriage." Section 4814 gives the Commission some jurisdiction over suburbs.

<sup>113</sup> MISS. CODE ANN. (1930) § 7046. This Statute provides: "The term 'railroad' includes and applies to every person, firm, association of persons, and company, whether incorporated or not, who or which shall own or operate a railroad as a common carrier; and the term 'company' embraces . . . which shall own or operate a telegraph or telephone line, or do an express or sleeping car business." Section 7047 gives the Commission jurisdiction over car service associations. Section 7048 gives the Commission concurrent jurisdiction with municipalities over street cars.

<sup>114</sup> NEB. COMP. STAT. (1929) § 75-401. This Statute provides: "The term 'railway company' as used herein shall be taken to include all corporations, companies, individuals and associations of individuals, their lessees or receivers, ap-

Texas has declared natural gas sold to the public or furnished to others who sell it to the public to be a public utility.<sup>117</sup> From the whole Statute of this State it appears that the policy is to conserve the mineral resources of the State.

pointed by any court whatsoever that may now or hereafter own, operate, manage or control any railroad . . . in this State, and . . . as shall do the business of common carriers on any railroad in this State. The term 'common carriers' . . . include all corporations . . . own, operate . . . any railroad, interurban or street railway line . . . or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire." Section 75-1101 declares oil and gas pipe lines are common carriers and subject to the jurisdiction of the Commission.

<sup>115</sup> S. D. REV. CODE (1919) § 9503. This Statute provides: "The term 'transportation' shall include all instrumentalities of shipment or carriage, and the term 'common carrier' as used in this article shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad, express company, telegraph or telephone company . . . in this State; and . . . shall apply to all persons, partnerships and companies and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon or over any railway, express, telegraph or telephone line in this State, except street railroads." This Section also gives the Commission jurisdiction over "car companies, sleeping car companies, freight or freight line companies." Chapter 349, Laws 1921, confers jurisdiction on the Commission over stock yards. Section 9748 provides: "All elevators, flour mills purchasing grain for re-shipment and warehouses in this State wherein and whereat grain is purchased, received or handled, are hereby declared to be public warehouses." Section 9775 provides: "Any building or warehouse within this State, where goods or articles of personal property of any character other than grain or seed shall be received for storage for hire, shall be known as a storage warehouse." Section 9792 provides: "The terms 'telegraph company' and 'telephone company,' as used in this chapter, shall be construed to embrace all corporations, associations and individuals, their trustees, lessees and receivers, that now or hereafter may own, operate, manage or control any telegraph or telephone line, system or exchange . . . in this State. . . ."

<sup>116</sup> TEX. STAT. (Vernon, 1936) art. 6445. This Statute confers jurisdiction on the Commission over railroads, suburban, belt and terminal railroads, public wharves, docks, piers, elevators and warehouses. Article 6479 provides: "The terms 'road,' 'railroad,' 'railroad companies,' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations, companies, individuals and associations of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad . . . in this State, and all such corporations . . . as shall do the business of common carriers on any railroad in this State. . . The provisions of this Chapter . . . shall not apply to street railways nor suburban or belt lines of railways in or near cities. . . ." Article 6018 confers jurisdiction on the Commission over pipe lines carrying crude oil for the public, and "owning, operating or managing or participating in ownership . . . of . . . any pipe line . . . for the transportation from any oil field . . . within this state to any distributing, refining or marketing center or reshipping point thereof, within this State, of crude petroleum bought of others. . . ."

The last group consists of the states of Colorado,<sup>118</sup> Georgia,<sup>119</sup> Iowa,<sup>120</sup> Louisiana,<sup>121</sup> Massachusetts,<sup>122</sup> Michi-

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<sup>117</sup> TEX. STAT. (Vernon, 1936) art. 6050. This Article also includes those who have a virtual monopoly of natural gas in any community, and those who use the right of eminent domain, or use the highways in laying pipe lines for the carriage of natural gas.

<sup>118</sup> COLO. COMP. LAWS (1921) § 2912. This Statute defines: corporation, person, common carrier, (includes "every railroad corporation, express corporation, dispatch, sleeping car, dining car, drawing room car, freight, freight-line refrigerator, oil, stock, fruit, car loaning, car renting, car loading . . . and every other car corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, operating for compensation within this State.") Section 2913 provides: "The term 'public utility,' when used in this Act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation, or person now or hereafter declared by law to be affected with a public interest. . . . *Provided*, That nothing in this Act shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation."

<sup>119</sup> GA. CIV. CODE ANN. (Michie, 1926) § 2642. This Statute provides: "The terms 'railroad corporation' . . . contained in this Article, shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating or which may hereafter own or operate any railroad . . . in this State, and . . . shall do business as common carriers upon any of the lines of railroad in this State. . . ." Section 2660 gives the Commission jurisdiction over express, and telegraph companies. Section 2662 extends the jurisdiction of the Commission to street railways and suburbans (except in cities over 75,000 and under 125,000 in population), docks, wharves, terminals, cotton compress, telegraph, telephone, gas, and electricity.

<sup>120</sup> IOWA CODE (1927) § 7874. This Statute provides: "The board shall have general supervision of all railroads in the State, express companies, car companies, sleeping car companies, freight and freight line companies, interurban railway companies, motor carriers, and any common carrier engaged in the transportation of passengers or freight by railroads, except street railroads, and also all lines for the transmission, sale, and distribution of electrical current for light, heat, or power, except in cities and towns." Section 8037 provides: "The terms 'railroad' and 'railway' as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad. . . . The term 'transportation' shall include all instrumentalities of shipment or carriage." This Section defines a railroad corporation as any concern which operates a railroad, "except street railways." Section 8201 provides: "Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town, or village . . . shall be known as an interurban railway, and shall be a work of internal improvement." Acts 1934, S. S. H. F. 216, effective March 23, 1934, provide: "(1) The term 'pipe line' insofar as this chapter is concerned shall include and mean any pipe . . . or pipe lines used for the transportation or transmission of gas, gasoline, oils or motor fuels and for inflammable fluids within or through this State." The term "pipe line company" is defined as any concern owning, operating, etc., a pipe line. Chapter 104, Laws of 1935, gives the Board limited jurisdiction over warehouses.

gan,<sup>123</sup> Nevada,<sup>124</sup> and Vermont.<sup>125</sup> These jurisdictions have made no serious efforts to define public utilities. Although

<sup>121</sup> LA. GEN. STAT. (1932) Tit. 55, c. 1, § 7916. This Statute gives the Commission jurisdiction to fix reasonable rates on the intrastate freight business of railroads, and other common carriers, express, telephone, and telegraph companies. Section 7917. 1 provides: "Hereafter the Louisiana public service commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, water works, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished or to be furnished by such public utilities. Provided that this act shall not apply to any public utility the title to which is in the State of Louisiana or any of its political sub-divisions or municipalities." Section 7917. 2 provides: "The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utilities." Act 76 of the Acts, 1920, Section 1, gives the Commission jurisdiction over pipe lines carrying crude petroleum. Section 3 provides: "That the term 'common carrier' as used in this Act shall include all persons, firms or corporations engaged in the transportation of crude petroleum as 'common carriers' for hire; or which upon proper showing may be legally held to be a 'common carrier' from the manner in which such business is carried on." Section 5 defines pipe line in New York fashion. Act 224, of the Acts of 1926, gives the Commission jurisdiction over toll bridges and toll roads.

<sup>122</sup> MASS. GEN. LAWS (1921) § 76. This Statute gives the Department jurisdiction over gas and electric companies. Section 94 makes the Act applicable to water companies. Chapter 159, Section 12, gives the Department jurisdiction over common carriers and classifies steam, street and electric railways, express companies, steamships, motor carriers, facilities used in connection with common carriers, telegraph, and telephone companies as common carriers. Chapter 163 extends jurisdiction over trackless trolleys.

<sup>123</sup> MICH. COMP. LAWS (1929) § 11019. This Statute provides: "The term 'common carrier' as used in this Act shall be construed to mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers appointed by any court whatsoever who now or may hereafter own, operate, manage or control as a common carrier in this State, any railroad . . . or express company, car loaning companies, freight or freight line companies and all associations or persons . . . that shall do business as common carriers upon or over any line of railroads in this State, or any common carrier engaged in the transportation of passengers and property wholly by rail or partly by rail and partly by water. . . . The term 'transportation' [is defined in a manner similar to the New York definition of "transportation of property"] . . . The term 'railroad' as used in this Act shall be construed to mean all railroads, whether operated by steam, electric or other motive power: *Provided*, That the provisions of this Act shall not apply to any logging or other private railroad not doing business as a common carrier. . . . *Provided further*, That nothing in this Act contained shall apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities or within a distance of five [5] miles of the boundaries thereof. . . . Express companies and sleeping car companies doing business for hire within this State are hereby defined to be common carriers." Section 11700 provides: "All persons, corporations and associations operating telephone lines or exchanges doing a telephone business within the State of Michigan, are hereby declared to be common carriers. . . ." Section 11093 gives the Commission jurisdiction over electric companies. Section 11634

provides: "There is hereby granted to and vested in the Michigan public utilities commission . . . the power to control and regulate corporations, associations and persons engaged, directly or indirectly, in the business of purchasing or selling or transporting natural gas for public use. . . ." Section 11009 gives the Commission jurisdiction over steam and gas utilities. Section 11071 gives the Commission jurisdiction over water carriers, exempting any ferry under municipal control. The Public Acts of 1927, section 1, give the Commission jurisdiction over radio broadcasting. The Public Acts of 1929, number 16, give the Commission jurisdiction over pipe lines carrying crude oil.

<sup>124</sup> NEVADA PUBLIC SERVICE COMMISSION LAW § 7. This Statute provides: "The term 'Public Utility' as used herein, shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever) that now, or may hereafter, own, operate, manage, or control any railroad . . . as a common carrier in this State, or . . . any docks or wharves or storage elevators used in connection therewith, whether owned by such railroads or otherwise; also . . . self-propelled vehicles, engaged in the transportation of persons or property for hire over and along the highways of this State as common carriers; also express companies, telegraph and telephone companies; also radio or broadcasting instrumentalities, and airship common carriers. . . . *Provided, however,* that the term 'Public Utility,' as used herein, shall not include corporations . . . insofar as they own, control, operate or manage motor vehicles operated as hearses, ambulances, taxicabs or hotel busses, or engaged in the transportation of persons or property for hire exclusively within the limits of a city or town. . . . 'Public Utility' shall also embrace every corporation . . . that now or may hereafter own, operate or control any ditch, flume, tunnel or tunnel and drainage system, charging rates . . . directly or indirectly, any plant or equipment . . . for the production, delivery or furnishing for or to other persons . . . or corporation, private or municipal, heat, light, power in any form or by any agency, water for business, manufacturing, agricultural, or household use, or sewerage service whether within the limits of municipalities, towns, or villages, or elsewhere. . . .

"The provisions of this Act and the term 'Public Utility' shall apply to the transportation of passengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the State . . . and shall apply to railroads, corporations, airships, automobiles, auto trucks, or other self-propelled vehicles, express companies, car companies, freight and freight-line companies, and to all associations of persons, whether incorporated or otherwise, that shall do any business upon or over any line of railroad or any public highway within this State, and to any common carrier engaged in the transportation of passengers and property, wholly by rail, or partly by rail and partly by water, or by air."

<sup>125</sup> Vt. P. L. (1933) § 6074. This Statute gives the Commission jurisdiction over railroads "whether operated by steam, electricity or other power." Section 6085 provides: "The Public Service Commission shall have general supervision of all companies [trustees, receivers, directors, or lessees] engaged in the manufacture, distribution, or sale of gas or electricity directly to the public or to be ultimately used by the public for lighting, heating or power, companies other than municipalities engaged in the collecting, sale and distribution of water for domestic purposes or fire protection purposes, and of all companies engaged in the construction and maintenance of storage reservoirs, whether for the purpose of prevention of damage by flood, for the purpose of power to be developed at such reservoirs or for the benefit of water powers, developed or undeveloped, so situated as to be affected by such reservoirs; of motor vehicles used as common carriers, ferries and dams; of all express companies and of all companies owning or operating tele-



traces of the New York and Wisconsin acts can be found here and there, generally their statutes do little more than list the utilities which are subject to the jurisdiction of the public service commissions. The public service commissions are statutory bodies, and can have only that jurisdiction which has been conferred by statute. The statutes of these states list the utilities which are subject to that jurisdiction and mark out the exceptions. And perhaps this is a wise policy after all, because: (1) the definitions do not *define*, (2) common law concepts have been read into them regardless of their phraseology, (3) attempts at codification of the common law has created limitations upon the jurisdiction of the commissions which were probably never intended, and (4) what property is subject to control is a question of fact which the courts have reserved unto themselves notwithstanding the copious and detail listing of the different parts of a "telephone line," etc.

In conclusion, what has been the effect of the statutory definitions? The effect has been well-epitomized by the Illinois Court:<sup>126</sup>

"The Act does not attempt to define a public utility, but, on the contrary, designates the classes of public utilities that are to be held to be embraced within the meaning of the Act and subject to its provisions. Whether a given business, industry, or service rendered is a public utility depends, not upon legislative definition, but upon the particular facts and circumstances in each case. It is the nature of the business or service rendered — its public character — that makes its regulation a matter of public consequence or concern because it affects the whole community, that stamps it with such a public interest, that it is properly subject to legislative supervision and control. The legislative declaration that a certain business shall be deemed a public utility would not make it such, if in fact the business as conducted is not impressed with a public use or carried on for the public benefit. The Act does not create, but only regulates, existing public utilities."

graph or telephone lines, stations or exchanges, within this State . . . provided, however, that all other companies whose principal business is other than the manufacture, distribution or sale of gas or electricity directly . . . to be ultimately used by the public for lighting, heating or power, shall be under the supervision of the Commission only as to that part [which is public]."

<sup>126</sup> State Public Utilities Com'n v. Monarch Refrigerating Co., 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528, P. U. R. 1915D, 119 (1915).

If *New York v. Nebbia* had been decided twenty years earlier, is it probable that the statutes would have *defined* instead of merely *designated*?

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(To be continued.)